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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/665,960

Filing Date: September 18, 2003

Appellant(s): WANG ET AL.

Chris Konkol
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 11/6/07 appealing from the Office action mailed

4/5/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,281,261

LIN

01-1994

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

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A. Claims 1, 3-7, and 9 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 1 recites, "wherein essentially no monomer is present in the aqueous pigment mixture". Specifically, with respect to the recitation of the phrase "essentially", it is the examiner's position that this phrase fails to satisfy the written description requirement under the cited statute since there does not appear to be a written description requirement of the phrase in the application as originally filed, *In re Wright*, 866 F.2d 422, 9 USPQ2d 1649 (Fed. Cir.. 1989) and MPEP 2163. Appellant has not pointed to any portion of the specification, and examiner has not found any support for this phraseology in the specification as originally filed.

It is noted that, in the amendment filed 1/26/06, appellants amended claim 1 to recite "wherein no monomer is present in the aqueous pigment mixture". Subsequently, in the amendment filed 6/5/06, appellants inserted the phrase "essentially" into claim 1, i.e. "wherein essentially no monomer is present in the aqueous pigment mixture". However, it is the examiner's position there is no support in the specification as originally filed to recite "essentially" no monomer.

B. Claims 1, 3-7, and 9-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.

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(a) Claim 1 recites "wherein essentially no monomer is present in the aqueous pigment mixture". The scope of the claim is confusing because it is not clear what is meant by "essentially" no monomer or how much monomer this encompasses. Further, it is not clear how the phrase "essentially no monomer" is different than previously recited phrase "no monomer".

(b) Newly added claim 10 recites "wherein sequential addition of initiator to the pigment mixture essentially prior to adding monomer mixture". The scope of the claim is confusing because it is not clear what "essentially" prior means. Clarification is requested

C. Claims 10 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Lin (U.S. 5,281,261).

Lin discloses composite colorant polymer particles, i.e. modified pigment particle, obtained by polymerizing at least one monomer in the presence of colorant in situ using emulsion polymerization. The monomers include sodium styrene sulfonate salt. The colored resin particles have average particle size of less than 1 μm . The ratio of colorant to polymer is 1:9 to 9:1. The polymer is formed by mixing initiator and pigment dispersion, i.e. pigment, dispersant, water, to which is added monomer and initiator. It is significant to note that Lin discloses that the free radical initiator reacts with the pigment to form a pigment radical which then polymerizes the monomer. Further, attention is drawn to example VIB (col. 18, lines 17-56) wherein Lin discloses adding (i) mixture of water, pigment, monomer, and initiator to (ii) mixture of monomer and initiator. Thus, in the example, a portion of the initiator is added to aqueous colorant mixture, i.e. comprising pigment, monomer, and initiator, before adding a monomer mixture, i.e. monomer and initiator. Therefore, there is disclosed sequential addition of initiator to pigment prior to adding the monomer. While there is monomer present in the

pigment mixture, it is noted that there is nothing in the scope of the present claims (with the exception as disclosed in the next paragraph) that excludes the pigment mixture from comprising monomer (col. 1, lines 8-22 and 40-44, col. 5, line 65-col. 6, line 46, col. 7, lines 40-42, col. 8, lines 65-66, col. 9, lines 15-26 and 57-65, col. 10, lines 4-15, col. 12, lines 54-59, and col. 13, lines 10-16 and 54-59). There is no explicit disclosure that the composite colorant polymer particles are stable, i.e. do not flocculate for up to 20 minutes when a dispersion containing the particles is added to acetone at 1% by weight, as presently claimed. However, given that Lin discloses composite colorant polymer particles identical to that presently claimed, it is clear that the composite colorant polymer particles would inherently possess same stability as presently claimed.

It is noted that the present claims recite "consisting essentially of" transitional language with respect to the aqueous colorant mixture, i.e. "consisting essentially of colorant particles, dispersant or surfactants, and water". While Lin discloses that the aqueous colorant mixture contains monomer, on the one hand, it is noted that while it is recognized that the phrase "consisting essentially of" narrows the scope of the claims to the specified materials and those which do not materially affect the basic and novel characteristics of the claimed invention, absent a clear indication of what the basic and novel characteristics are, "consisting essentially of" is construed as equivalent to "comprising". Further, the burden is on the appellant to show that the additional ingredients in the prior art, i.e. monomer, would in fact be excluded from the claims and that such ingredients would materially change the characteristics of the appellant's invention. See MPEP 2111.03.

On the other hand, it is significant to note that in example VIB of Lin, for instance, it is disclosed that in the aqueous colorant mixture the monomer is utilized as a wetting agent to disperse pigment, i.e. functions as a dispersant, and thus, the monomer in the aqueous colorant phase of Lin would fall within the scope of the present claims, i.e. aqueous colorant mixture of Lin contains only water, pigment, and dispersant (monomer).

In light of the above, it is clear that Lin anticipates the present claims.

With respect to newly added claim 12, it is further noted that Example VI of Lin discloses adding initiator solution to pigment dispersion, i.e. water, pigment, dispersant, namely, sodium p-styrene sulfonate salt wetting agent, which mixture is then added to monomer mixture, i.e. monomer and initiator. Therefore, there is disclosed sequential addition of initiator to pigment prior to adding monomer mixture. Further, Lin discloses that the free radical initiator reacts with the pigment to form a pigment radical which then polymerizes the monomer (col.9, lines 57-65).

(10) Response to Argument

A. Appellants' argue that the phrase "essentially" no monomer is clear and is made to prevent a potential infringer from adding, for example, a single monomer to the claimed mixture to design around the claims. However, firstly, the examiner's position remains that there is no support in the specification as originally filed to recite "essentially". Appellant has not pointed to any portion of the specification, and examiner has not found any support for this phraseology in the specification as originally filed. There is no disclosure of the phrase "essentially" in the

specification as originally filed. The appellant's statement that the examiner contends that the term "essentially" does not change the meaning of the originally claimed invention, since (by analogy) the term "consisting essentially of" is well known not to be new matter, even though in haec verba support may not be found in the specification. The instant issue does not involve the well defined phrase "consisting essentially of" which is defined by the courts in various case law citations, e.g. MPEP 2111.03. The instant situation involves the nebulous term "essentially" and the issue that the newly added scope inferred by this term finds no support in the originally filed specification and the fact that the metes and bounds of this nebulous term cannot be determined by the skilled artisan due to it not being described in the originally filed specification. The examiner made no determination regarding the amount of monomer that can be present in the instant invention as far as this new examiner can determine, though the meaning of "no monomer is present" would appear to be such. This rejection is not a question of the doctrine of equivalents but is one of new matter and failure to particularly point out and distinctly claim the subject matter which appellant regards as the invention. It is not seen that Festo, cited by appellant, applies to these issues. As the examiner reads "no monomer is present", the examiner agrees with the appellant's contention that the apparently adequately described "no monomer is present" should read on "no monomer is present" as described by the appellant. However, this is not an issue of infringement. The examiner's do not deal with this issue as far as this examiner can see. This issue is one of new matter and failure to particularly point out and distinctly claim the subject matter which appellant regards as the invention. The examiner cannot determine the scope of the phrase "essentially no monomer is present" because it is a relative and vague term and because it is not described nor found in the originally filed specification, which makes it new.

matter, i.e. not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The examiner makes no determination of the worth of the claim, as argued by the appellant. The examiner can only read the specification, as originally filed, in making the new matter determination. The nature of the vague and relative term “essentially” combined with it not being described nor found in the originally filed specification, which makes it new matter, i.e. not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention is what determined the prior examiner’s making of the above stated rejections under 35 USC 112. It seems unreasonable to the examiner that where the applicant stated that “no monomer is present” one should infer that “essentially no monomer is present” where the appellant did not state in the originally filed specification that “essentially no monomer is present”. On their face they have clearly different meanings just as “consisting” and “consisting essentially of” have clearly different meanings.

The appellant’s argument that this approach does not promote invention and their citation of the constitutional purpose of patents is noted. However, it is not believed that the above cited sections of 35 USC 112 have been found unconstitutional. This argument has no merit therefore. The purpose of 35 USC 112 is so that, in return for the monopoly granted by a patent, the applicant does their duty and properly describes in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention and particularly point out and distinctly claim the subject matter which appellant regards as the invention so that the skilled

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artisan knows the scope of the claims so that he can avoid infringement in the first place while practicing inventions which should not be granted the monopoly offered by patents.

The above arguments apply to the rejections under both the first and second paragraphs of 35 USC 112.

The appellant argues that the examiner stated that "consisting essentially of" has no meaning. This examiner does not see such a statement by the prior examiner anywhere. This appears to be a gross mischaracterization of what the examiner has stated on the record of this application, which can be seen by reading the prior examiner's office actions in their entirety.

The 35 USC 112, second paragraph rejection reads "Claim 1 recites "wherein essentially no monomer is present in the aqueous pigment mixture". The scope of the claim is confusing because it is not clear what is meant by "essentially" no monomer or how much monomer this encompasses. Further, it is not clear how the phrase "essentially no monomer" is different than previously recited phrase "no monomer"."

Appellant's arguments regarding "consisting essentially of" are not material to the rejection made.

It is not seen that the courts have defined "essentially no monomer" with the same language they use in defining "consisting essentially of". The instant claims do not recite "consisting essentially of". As stated above, it would be unclear to the ordinary skilled artisan how much monomer could be present and still be encompassed by "essentially no monomer" because "essentially" is not defined by the instant specification and is a relative term that is nebulous in its scope.

The appellant asks why the applicants cannot exclude the prior art by use of the phrase "consisting essentially of". This is a gross and misleading mischaracterization of the above rejections, which do not reject the language "consisting essentially of" clearly.

The appellant argues what the prior art does. This does not add to the skilled artisan's understanding of what is intended by "essentially no monomer is present". The examiner has not failed to give meaningful weight to the claimed inventions in a manner unsupported by the patent laws. This can be seen in the clear rationale of the above stated rejections under 35 USC 112 first and second paragraphs, the appellant's representative's mischaracterization of the examiner's rejections as rejecting "consisting essentially of" rather than "wherein essentially no monomer is present" at page 4, last paragraph of their brief, and the lack of support or definition of "wherein essentially no monomer is present", particularly the vague, relative term "essentially" in the context claimed. The appellant's characterization of the court's definition of "consisting essentially of" as being superficially equivalent means to the instantly claimed, undefined "wherein essentially no monomer is present" is wrong on its face because the courts have not defined "wherein essentially no monomer is present" and neither has the appellant. This examiner has been described by his former SPE as reasonable. This examiner has done this job for about 18 years. He has therefore read thousands of specifications and gained a bit of knowledge of the polymer arts. He, like the former examiner, does not know what the scope of "wherein essentially no monomer is present" is intended to be by the appellant because they did not define the vague and relative term "essentially" in their originally filed specification nor show any intent to have other than "no monomer" present in the claimed invention. Thus, the ordinary skilled artisan cannot determine the scope of the instant claims and there is no basis to

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conclude that the appellant intended the additional scope implied by "essentially" in "wherein essentially no monomer is present" to be part of the invention of the originally filed specification.

The examiner's position remains that the scope of the claims reciting "wherein essentially no monomer is present" remains confusing given that it is not clear what is meant by the phrase. Further, it is not clear what, if any, difference there is between the phrase "essentially" no monomer and "no monomer". Clarification is requested.

The rejection of paragraph 9(B)(b) above recites "Newly added claim 10 recites "wherein sequential addition of initiator to the pigment mixture essentially prior to adding monomer mixture". The scope of the claim is confusing because it is not clear what "essentially" prior means. Clarification is requested."

The appellant has not addressed this rejection specifically. This examiner agrees with the former examiner that one is either prior or not prior. It is not seen how "essentially prior" is possible. Since the appellant has not rebutted this rejection specifically, it should be affirmed.

Response to Arguments regarding 35 USC 102 rejection

Previously, the examiner, noted that the present claims recite "consisting essentially of" transitional language with respect to the aqueous colorant mixture, i.e. "consisting essentially of colorant particles, dispersant or surfactants, and water".

There is no closed language recited regarding the preambular language of the rejected claims, e.g. "Composite pigment polymer particles having". It is therefore taken that the final product to

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which the instant claims are drawn may contain other components. Furthermore, the appellant has not demonstrated that the additional components are not encompassed by the instantly claimed components. The appellant has not demonstrated that any additional components of the prior art materially affect the basic and novel characteristics of the instantly claimed invention in a manner commensurate in scope with the instant claims and the cited prior art. The examiner notes that the patentee discloses their polymers to be stably dispersible in the selected liquid vehicles, which the examiner takes to broadly encompass the instantly claimed acetone test since the vehicles of the reference may contain hydrophilic solvents in large portions. See column 9, lines 26-29.

While Lin discloses that the aqueous colorant mixture contains monomer, it was noted that while it is recognized that the phrase "consisting essentially of" narrows the scope of the claims to the specified materials and those which do not materially affect the basic and novel characteristics of the claimed invention, absent a clear indication of what the basic and novel characteristics are, "consisting essentially of" is construed as equivalent to "comprising". Further, the burden is on the appellant to show that the additional ingredients in the prior art, i.e. monomer, would in fact be excluded from the claims and that such ingredients would materially change the characteristics of the appellant's invention, See MPEP 2111.03. The examiner also noted that in example VIB of Lin, for instance, it is disclosed that in the aqueous colorant mixture the monomer is utilized as a wetting agent to disperse pigment, i.e. functions as a dispersant, and thus, the monomer in the aqueous colorant phase of Lin would fall within the scope of the present claims, i.e. aqueous colorant mixture of Lin contains only water, pigment, and dispersant (monomer).

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Appellants argue that the basic and novel characteristics clearly relate to the absence of monomer from the pigment mixture prior to addition of initiator resulting in the basic and novel characteristic of stability and point to the summary of the invention and field of invention sections in the present specification.

However, while these portions of the specification disclose that the composite colorant particles of the present invention have better stability than those prepared in the prior art and are very stable, appellants have provided no evidence to support this position, i.e. evidence showing that the additional ingredient the prior art, namely, monomer, would in fact be excluded from the claims and that such ingredient would materially change the characteristics of appellants' invention.

Appellants also argue that the composite polymer particles of Lin would not form stable dispersion as defined by the particles not flocculating for up to 20 minutes when a dispersion containing the particles is added to acetone at a 1wt.% concentration as required in present claim 10.

However, while there is no explicit disclosure in Lin that the composite colorant polymer particles are stable, i.e. do not flocculate for up to 20 minutes when a dispersion containing the particles is added to acetone at 1% by weight concentration as presently claimed, given that Lin discloses composite colorant polymer particles identical to that presently claimed, it is clear, absent evidence to the contrary, that the composite colorant polymer particles would inherently possess same stability as presently claimed.

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The appellant argues that the cited prior art does not teach excluding monomer from the pigment prior to addition of the initiation. The above clearly points out reacting initiator with the pigment prior to initiating polymerization. See column 9, lines 57-61. The appellant argues that the examiner equates "consisting essentially of" in the instant claims to "comprising". This is not absolutely correct. The examiner stated that "consisting essentially of" is given the meaning of "comprising" since the appellant has not shown the additional materials of the prior art to materially affect the basic and novel characteristics of the cited invention. The examiner also notes that the amiphilic monomers of the reference also fall within the scope of surfactant or dispersant of the instant claims and therefore are not excluded by the instant claims. The appellant has not addressed this part of the rejection. It is further noted that the instant claims are directed to products, not the methods of making them. The appellant has not shown the product of the above rejection to not fall within the scope of the instantly claims. See MPEP 2113. The appellant argues re pages 22-23 of their specification but does not show commensurately with disclosure of Lin that the product of Lin does not necessarily and inherently have the argued stability in a manner commensurate in scope with Lin and the instant claims. See MPEP 2112. The attorney argument to the contrary is not probative. The experimental evidence is not commensurate in scope with Lin and the instant claims. Arguments regarding obviousness are not persuasive since this is not an obviousness rejection for the reasons stated above and regarding the appellant's 132 declaration. Again the examiner notes that the appellant's claims recite the presence of surfactant or dispersant. The prior art monomer, argued by the appellant, has hydrophilic and hydrophobic segments clearly and is therefore a surfactant or dispersant. The appellant at page 6, last paragraph of their brief acknowledges the stability this monomer,

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which acts as surfactant/dispersant, will give. The appellant's argument that their monomers are hydrophobic is contrary to their disclosure, e.g. claim 3, which states that sodium styrene sulfonate can be the appellant's monomer. This argument is therefore clearly incorrect. The appellant argues regarding column 9, lines 15-29 of Lin. The appellant's declaration is not commensurate in scope with this disclosure since it clearly encompasses the use of hydrophobic comonomers, which the appellant attributes to the stability of their invention. Note the disclosure of styrene, olefins, vinyl ether, etc. as hydrophobic monomers. The disclosure of Lin is not limited to his examples, contrary to the appellant's arguments.

Appellant's representative's statement that the composite pigments of the instant claims are fundamentally different from those of Lin is not supported by probative evidence and is rebutted above. Appellant's argument that in the instantly claimed invention initiator can go to the pigment surface first and then polymer formed from the monomer mixture, mostly hydrophobic, grows attached to the pigment via initiator ignores column 9, lines 57-61, column 1, lines 7-13, etc. of Lin, which has been clearly pointed out to the appellant. Furthermore, the instant claims are not limited to hydrophobic monomers. Note appellant's claim 3, which claims the monomer of Lin, e.g. sodium styrenesulfonate. Appellant's argument that Lin later adds initiator after adding monomer ignores column 9, lines 57-61. The instant claims do not exclude unattached polymer, there is no probative evidence that all of the polymer of the instant claims is attached to pigment, and there is no evidence that polymer that is unattached in Lin materially affects the basic and novel characteristics of the instantly claimed invention. Furthermore, the unattached polymer is amiphilic and therefore falls within the scope of surfactant and dispersant of the

instant claims. Wet and dry rub resistance is addressed throughout this answer. The appellant's examples are not commensurate in scope with Lin, as stated above.

Response to Arguments regarding 1.132 declaration

Appellants filed 1.132 declaration on 1/26/06 in order to show that the additional ingredients, i.e. monomer, found in the pigment mixture of Lin would materially affect the basic and novel characteristics of the claimed invention and thus, fall outside the scope of the "consisting essentially of" transitional language recited in the claims with respect to the pigment mixture. Given that the declaration is relevant to newly added present claim 10 which also recites "consisting essentially of" transitional language with respect to the pigment mixture, the declaration is discussed below.

In the office action mailed 4/11/06, the examiner noted that the declaration discloses preparation of composite colorant particles by mixing magenta pigment dispersion, monomer, and initiator and then adding water, monomer, and initiator. It was shown that the resulting composite colorant particles are only stable for 6 minutes which is in direct contrast to the present claims that require that the particles do not flocculate for up to 20 minutes.

It was the examiner's position that the declaration was not commensurate in scope with the prior art, Lin. It was noted that the "consisting essentially of" claim language set forth in the present claims is with respect to the aqueous pigment mixture while the prior art Lin discloses utilizing monomer in the aqueous pigment mixture. Given that the examiner previously argued that absent a clear indication of what the basic and novel characteristics are, "consisting essentially of" is construed as equivalent to "comprising", the burden was on appellant to show

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that the use of monomer in the aqueous pigment mixture is in fact outside the scope of the "consisting essentially of" transitional claim language. However, the declaration did not prepare composite colorant particles comprising monomer in the aqueous pigment mixture. Rather, the declaration adds monomer (and initiator) to an already prepared pigment dispersion. Thus, contrary to the "closest" prior art Lin, the monomer is not in the aqueous pigment mixture. It is not clear what, if any, difference this would have on the stability results.

Thus, given that the declaration did not include monomer in aqueous pigment mixture but rather added the monomer after the formulation of the aqueous pigment mixture, it was the examiner's position that the declaration has not shown (i) that the inclusion of monomer in the aqueous pigment mixture is excluded from the scope of the present claims that recite "consisting essentially of" claim language with respect to the aqueous pigment mixture and (ii) the use of monomer in the aqueous pigment dispersion would materially change the characteristics of the appellant's invention.

In response in the amendment filed 6/5/06, appellants argue that while Lin utilizes hydrophilic monomer such as sodium styrene sulfonate, the polymer of the present invention is mostly hydrophobic and that it would not matter whether the monomers used in the present examples were added during or after preparation of the pigment dispersion in contrast to the monomer used by Lin.

However, while it is agreed that Lin utilizes monomer such as sodium styrene sulfonate, it is noted that such monomer is within the scope of the present claims (see claim 3). Further, while appellants argue that it would not matter when the monomer of the present invention is

added to the pigment dispersion, there is no evidence that adding the monomer of Lin, which falls within the scope of the present claims, to already prepared pigment dispersion (as disclosed in the declaration) instead of using pigment dispersion that already includes the monomer (as disclosed by Lin) would not affect the stability results.

Appellants argue that given that polymers used in Lin are primarily hydrophilic, they would not pass the Dry Rub or Wet Rub tests used in Table 3, page 20 of the present specification. Further, appellants argue that such polymers of Lin would not pass the stability test as required in the present claim.

With respect to the former, it is noted that there is no requirement in the present claims regarding the type of polymer utilized with the exception of present claim 3. Given that Lin discloses monomers as required in present claim 3, it is clear that Lin meets the requirements of the present claims with respect to the polymer. Thus, it is not clear why such polymer which falls within the scope of the present claims would not pass Dry Rub or Wet Rub tests. Further, while appellants argue that such polymer would not pass such tests, it is noted that appellants have offered no evidence to support this position. Further, there is nothing in the scope of the present claims that requires the polymer to pass a Dry Rub or Wet Rub test. With respect to the later, it is noted that there is no proper evidence that establishes that the such polymers of Lin would not pass the stability test as required in the present claim.

Appellants also argue that in the present invention, the initiator can go to the surface of the pigment first and the monomer mix grows attached to the pigment via initiator while in Lin,

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the monomers go to the surface of the pigment and the initiator is later dissolved in the aqueous carrier.

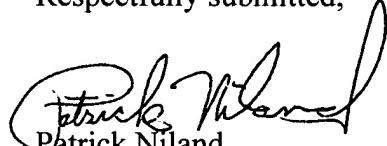
However, attention is drawn to col. 9, lines 57-61 of Lin that discloses that the free radical initiator reacts with the pigment to form a pigment radical which is then polymerizes the monomer.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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Conferees:


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